UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LINDA LONSBERRY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 01-245-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal, arising from the decision of an administrative law judge issued after a second hearing following remand from this court on motion of the commissioner, raises several issues concerning the evidence of the plaintiff's alleged physical and mental limitations prior to the date in 1988 when she was last insured for purposes of disability benefits under the Social Security Act. I recommend that the court affirm the commissioner's decision.

The plaintiff sought both SSD benefits and Supplemental Security Income ("SSI") benefits in her application, which was initially filed in July 1995. Record at 262. After a hearing held in June, 1996, *id*. at 26, the administrative law judge issued a decision denying both types of benefits, *id*. at 14-21. The Appeals Council declined to review the decision, *id*. at 6-7, and the plaintiff filed a timely

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 21, 2002 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

appeal in this court, *Lonsberry v. Commissioner*, Docket No. 98-150-B. The commissioner filed an assented-to motion for remand, *id*. at 391, which was granted on April 15, 1999, *id*. at 390. A second hearing was held before the same administrative law judge on July 6, 1999, *id.* at 275, and the resulting decision gives rise to the current appeal.

In accordance with the commissioner's sequential review process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 .2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part,[2] that the plaintiff met the disability insured status requirements of the Social Security Act on September 21, 1983, the date she stated she became unable to work, and that she acquired sufficient quarters of coverage to remain insured only through December 31, 1988, Finding 1, Record at 269; that she had not engaged in substantial gainful activity since September 21, 1983, Finding 2, *id*.; that the medical evidence established that, on December 31, 1988 she had poor vision in her right eye and a substance abuse disorder, impairments that were severe but did not meet the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Finding 3, *id*.; that her statements concerning her impairments and their impact on her ability to work on December 31, 1988 were not entirely credible, Finding 4, *id*. at 270; that she was unable to perform her past relevant work as an administrative assistant in the military, Finding 6, *id*.; that on December 31, 1988 her residual functional capacity was reduced due to poor vision in her right eye, although she had 20/20 vision in her left eye and her depth perception was not significantly reduced, Finding 5, *id*.; that her non-exertional limitations somewhat narrowed the range of work she was capable of performing as of December 31, 1988, Finding 7, *id*.; that, given her age (29), education (high school graduate) and work experience (semi-skilled, light exertional level) on December 31, 1988, she was able to make a successful vocational adjustment to work existing in significant numbers

[2] The administrative law judge awarded SSI benefits, Record at 270-71, and that portion of his decision is not before the court.

in the national economy, including numerous clerical jobs, Findings 8-11, *id*.; and that, therefore, the plaintiff was not under a disability, as defined in the Social Security Act, at any time through December 31, 1988, when her insured status expired, Finding 12, *id*. Because this decision of the administrative law judge was issued after remand from a federal court and the Appeals Council did not assume jurisdiction, it became the final decision of the commissioner. 20 C.F.R. § 404.984(a); Supplemental Record at 255A.

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

In this case the administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the administrative law judge failed to (1) properly consider the evidence that she suffered from a severe mental impairment prior to December 31, 1988; (2) find that she had a severe ankle injury; (3) determine the date of onset of her psychological impairments in accordance with Social Security Ruling 83-20; (4) properly develop the record; and (5) clarify the

rejection of assertedly uncontradicted medical evidence; that he improperly interpreted raw medical evidence; that he failed to apply the burden of proof properly; that he relied on flawed hypothetical questions posed to the vocational expert; and that the record lacks substantial evidence to support the administrative law judge's conclusions. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 5) at 4.

Mental Impairment and Date of Onset

The plaintiff correctly notes that the severity requirement at Step 2 of the sequential evaluation process imposes a *de minimis* burden on a claimant, *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986), but the plaintiff must still establish that the impairment at issue significantly limited her ability to do basic work activity at the relevant time, *Yuckert*, 482 U.S. at 145-46. She argues that the onset of her psychological problems preceded December 31, 1988 and that Dr. Luongo, a psychologist who evaluated her at the request of her attorney, "specifically dates the disabling effect of her psychological problems to the 1985-86 time frame." Itemized Statement at 5-6.

Specifically, Dr. Luongo reported that

> [t]he overall chaotic pattern of her life . . . would warrant a diagnostic [sic] of a Severe Personality Disorder of Mixed Type, with Borderline and Other Features. She clearly also suffers from the superimposed Post Traumatic Stress Disorder . . . .
>
> . . . The onset by history of these disabling conditions was in the 1985 to 1986 period . . . . A combination of her personality limitations and substance abuse made her unable to function adaptively during that period of her life.

Record at 248. The administrative law judge found that "there is no documentation in the record to establish the severity of the claimant's mental impairments prior to December 31, 1988." *Id*. at 264.

Social Security Ruling 83-20 instructs that

> [i]n disabilities of nontraumatic origin, the determination of onset involves consideration of the applicant's allegations, work history, if any, and the medical and other evidence concerning impairment severity. The weight to be given any of the relevant evidence depends on the individual case.

Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 50. The date alleged by the claimant should be used "if it is consistent with all the evidence available." *Id*. at 51. "[T]he established onset date must be fixed based on the facts and can never be inconsistent with the medical evidence of record." *Id*. According to SSR 83-20, "it may be possible," but only "[i]n some cases," for the administrative law judge to use the medical evidence of record "to reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id*. Such a determination "must have a legitimate medical basis;" it is necessary to call on the services of a medical advisor in such circumstances. *Id*.

SSR 83-20 also contemplates the possibility that the available medical evidence will not yield a reasonable inference about the progression of a claimant's impairment. *Id*. In such a case, "it may be necessary to explore other sources of documentation" such as information from family members, friends and former employers of the claimant. *Id*. The impact of lay evidence on the decision of onset will be limited to the degree it is not contrary to the medical evidence of record." *Id*. at 52.

Here, it is important to note that the administrative law judge did not find that the plaintiff had no psychological problems before December 31, 1988, but rather that the medical evidence did not establish the severity of those problems at that time. Dr. Luongo's report may fairly be described as establishing a professional diagnosis that the plaintiff suffered from a personality disorder and post traumatic stress disorder ("PTSD") as of 1985 or 1986.[3] However, it is also necessary that the evidence establish that one or both of these conditions was severe at that time. *See Flint v. Sullivan*,

[3] But see Dr. Luongo's actual statement: "The onset *by history* of these disabling conditions was in the 1985 to 1986 period . . . ." Record at 248 (emphasis added). The only basis for Dr. Luongo's opinion as to the date of onset is the plaintiff's own statements to him, making the opinion far less valuable than one based on clinical findings and the results of objective testing. *See* 20 C.F.R. § 404.1527(a); 404.1528(a) ("Your statements alone are not enough to establish that there is a physical or mental impairment."). In addition, Dr. Luongo was not a treating medical source; the plaintiff only saw him once, for the purpose of generating a report to be used in this proceeding.

951 F.2d 264, 267 (10th Cir. 1991) (retrospective diagnosis of PTSD without evidence of actual disability is insufficient). Here, the plaintiff offered no evidence, even through her own testimony, of severity of her psychological condition before December 31, 1988 other than Dr. Luongo's report. *See generally Jones v. Chater*, 65 F.3d 102, 103-04 (8th Cir. 1995) (court must address lay evidence concerning changes in claimant's personality at relevant time when retrospective medical diagnosis implied that claimant suffered from PTSD on date last insured). Dr. Luongo states that the plaintiff was "unable to function adaptively" during the 1985-86 period due to "[a] combination of her personality limitations and substance abuse." Record at 248. On March 29, 1996 Congress enacted Pub. L. No. 104-121, eliminating drug or alcohol addiction as a basis for obtaining disability benefits. *See* Historical and Statutory Notes to 42 U.S.C. §§ 423, 1382c; *Jones v. Apfel*, 997 F. Supp. 1085, 1093 (N.D. Ind. 1997). Under the new provision, "[a]n individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). The applicable regulation provides that the key factor in determining whether drug addiction or alcoholism is a material contributing factor is whether the individual would still be found disabled if she stopped using drugs or alcohol. 20 C.F.R. § 404.1535(b)(1). A claimant bears the burden of proving that drug or alcohol addiction is not a contributing factor material to her disability. *Brown v. Apfel*, 192 F.3d 492, 498 (5th Cir. 1999); *Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000). The amendment applies to all claims pending at the time of the amendment, regardless of the time when the disability is alleged to have existed. *O'Kane v. Apfel*, 224 F.3d 686, 688 (7th Cir. 2000); *Adams v. Apfel*, 149 F.3d 844, 846 (8th Cir. 1998); *Torres v. Chater*, 125 F.3d 166, 171 (3d Cir. 1997).

While Dr. Luongo states that the plaintiff would still be incapable of sustained gainful activity if she eliminated the consumption of alcohol at the time of his evaluation in July 1996, Record at 248-49, he does not make the same statement about the period before December 31, 1988.[4] It is not possible to tell from the record whether the psychological conditions diagnosed by Dr. Luongo, independent of the plaintiff's substance abuse, were severe before the date last insured. There is no other medical evidence on this point, and the burden rests with the plaintiff. Accordingly, the administrative law judge did not err with respect to the plaintiff's alleged mental limitations at Step 2.

Ankle Injury

The plaintiff notes that the administrative law judge "stated that her ankle problem was not severe," that she was awarded a ten percent disability for her left ankle by the Veterans' Administration, and that "the failure to consider the ankle injury . . . was a violation of the [unspecified] regulation and legal error." Itemized Statement at 5, 9. This somewhat cryptic argument is based on an injury to her left ankle sustained by the plaintiff while serving in the military before 1983. Record at 288. The plaintiff offers no authority for the proposition that a military disability award is the equivalent of the medical evidence that is required to establish a severe injury at Step 2, and my research has located no such authority. The administrative law judge found that

> [Veterans Administration rating examinations in December 1991 and December 1995] establish that Ms. Lonsberry had a history of right [sic] ankle injuries while in the military service in 1982. However, there is insufficient medical evidence to show that this represented a severe impairment as of the date on which her insured status expired. The December 1991 VA examination revealed palpable tenderness in the ankle but no structural abnormality and no swelling. In December 1995, the clinical impression was that the ankle had good strength but did evidence some limitation of motion.

[4] Counsel for the plaintiff contended at oral argument that the administrative law judge's finding number 16 is a finding that the plaintiff's alcohol was not a contributing factor before the data last insured. Record at 271. To the contrary, the opinion makes clear that this finding relates only to the SSI claim. *Id.* at 270-71.

Record at 264. The administrative record contains no medical records concerning the plaintiff's ankle dated before the date last insured. An x-ray of the ankle in December 1991 was normal. *Id*. at 162. Howard Stewart, M.D., examined the ankle in December 1995 and found minimal limitation of motion. *Id*. at 205. It is the claimant's burden at Step 2 to provide medical evidence of a severe limitation. No such evidence concerning the plaintiff's left ankle before December 31, 1988 has been provided, and the medical evidence in the record concerning the ankle after that date cannot provide the basis for a reasonable inference of earlier severity. The administrative law judge made no error in his evaluation of the ankle injury.[5]

Further Development of the Record

Noting that "[t]here are only four pieces of psychological evidence in this file," and that the two state-agency reviewers "state[d] that a determination of RFC is needed and that there is insufficient evidence regarding the severity of the mental impairments prior to the DLI in 1988," Itemized Statement at 14, the plaintiff suggests that the administrative law judge was required to contact Dr. Luongo or the only other examining psychologist, Dr. Stiefel, for clarification "[i]f the ALJ was unclear about the significance of the psychological evidence," *id*. at 15, and that "the ALJ could have obtained a further consultative exam," *id*. at 16. Of course, there is no suggestion in the administrative law judge's decision that he was "unclear about the significance of the psychological evidence." Counsel for the plaintiff could not point to any inherent ambiguities or relevant but inconclusive passages in the psychologists' reports when asked to do so at oral argument. *See Perez v. Chater*, 77 F.3d 41, 47-48 (2d Cir. 1996). In addition, since the only stated opinion concerning the

[5] The plaintiff also contends, in a conclusory argument, that she is entitled to remand because the administrative law judge failed to consider the cumulative effect of the ankle injury, mental impairments and eye injury before December 31, 1988, regardless of their severity, as required by an unspecified regulation. Itemized Statement at 8-9. Since there is no medical evidence of the severity of the ankle injury or the mental impairments before the date last insured, as discussed above, there is no basis on which to determine whether these unrelated alleged impairments in combination with the eye injury would establish a cumulative severe injury at Step 2. *See* Social
(*continued on next page*)

date of onset of the plaintiff's psychological problems was based entirely on her own statements to Dr. Luongo, it is difficult to discern what additional information on the point could be gleaned from him. Similarly, a consultative examination could only base an opinion on the severity of the plaintiff's mental limitations before December 31, 1988 on her own statements, since she has not offered any other medical or lay evidence about her behavior at that time. Such an opinion would be subject to the same infirmities as is Dr. Luongo's opinion.

Rejection of Medical Evidence

The plaintiff contends that the administrative law judge's errors include "the failure to clarify the significance of, or alternatively the rejection of uncontradicted medical evidence." Itemized Statement at 4. This is the only mention of this claimed error in the plaintiff's statement. To the extent that the claim is meant to apply to some allegedly uncontradicted medical evidence other than that discussed elsewhere in this recommended decision, the claim is not sufficiently specific to allow the court to address it and must be considered waived.

Interpretation of Raw Medical Evidence

The plaintiff asserts that, because "Dr. Luongo unequivocally opined that Ms. Lonsberry was disabled from 1985-86 by the personality disorder and PTSD and would continue to be even in the absence of alcohol," and "[t]hat view was strongly supported by the DDS evaluation by Dr. Stiefel," the administrative law judge must have been "interpreting the raw medical evidence directly in order to conclude that somehow the record contained information from which he could find . . . that the mental impairments did not exist or were not severe prior to the DLI." Itemized Statement at 15. While it is true that an administrative law judge, under most circumstances, is not qualified to interpret raw data in a medical record, *Manso-Pizarro*, 76 F.3d at 17, that is not what happened here. As I

Security Ruling 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 393.

noted previously, Dr. Luongo's report says only that "[a] combination of her personality limitations and substance abuse made her unable to function adaptively during" the 1985-86 period. Record at 248. He does not say how severe the "personality limitations" would have been at that time in the absence of substance abuse; his statement concerning the severity of the plaintiff's mental limitations in the absence of alcohol abuse is limited to the time of his examination. *Id*. at 249. The general reference to the evaluation performed by Dr. Stiefel is not particularly helpful to the court. In any event, Dr. Stiefel's conclusions are all directed to the plaintiff's condition at the time of her examination in 1995. *Id*. 198-201. Dr. Stiefel's report cannot be fairly characterized as supporting a conclusion that the plaintiff was disabled by her mental limitations on or before December 31, 1998, nor can it reasonably be read to provide a basis for a conclusion that those limitations were severe at that time. Accordingly, the plaintiff is not entitled to remand on this basis.

Hypothetical Questions

The plaintiff contends that the hypothetical questions posed to the vocational expert by the administrative law judge "were flawed and invalid" because they did not include "any consideration of either the ankle problem or the mental impairments," which should have been included even if they were less than severe. Itemized Statement at 21. As previously discussed, there is no medical evidence in the record concerning the severity of the plaintiff's problem with her ankle before December 31, 1988. The administrative law judge was not required to include in his hypothetical the plaintiff's testimony concerning her ankle, unsupported by any medical evidence.[6] 20 C.F.R. § 404.1529(b); *see Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) ("inputs into [the] hypothetical must correspond to conclusions that are supported by the outputs from the medical authorities"). Similarly, a reference to PTSD or severe personality disorder, without

[6] The administrative law judge did say to the vocational expert that "[the plaintiff] has a history of injury to her ankle, but it doesn't (*continued on next page*)

any indication of the severity of either condition or its effect on the plaintiff's ability to perform basic work activities, in the absence of substance abuse, before December 31, 1988, would not have provided sufficiently specific information to allow the vocational expert to modify her testimony. When the plaintiff's attorney added to the administrative law judge's hypothetical question the effects of the mental limitations that he apparently believed would have been present at the relevant time, the vocational expert responded that no jobs would have been available. Record at 326. Any possible error in the questioning of the vocational expert on the issue of mental limitations was therefore eliminated. The administrative law judge did not err when he rejected those limitations, for the reasons already discussed. Accordingly, the questions posed to the vocational expert by the administrative law judge provide no basis for relief for the plaintiff.

Application of Burden of Proof and Sufficiency of the Evidence

The plaintiff contends that "[g]iven the limitation to sedentary [work] and the non-exertional mental limitations found by Dr. Stiefel and Dr. Luongo, [the administrative law judge] should have found that she was unable to work, consistent with the testimony of the V[ocational] E[xpert]," and that "[t]here is simply not substantial evidence to support the RFC for the unreduced range of sedentary work." Itemized Statement at 19. As I have already discussed, the reports of Dr. Stiefel and Dr. Luongo do not provide the necessary support for a conclusion that the mental limitations they found applicable in 1995 and 1996, respectively, were also present, independent of substance abuse, before December 31, 1988. The plaintiff also argues that the vocational expert identified only jobs at the light level, rendering the conclusion that she was capable of a full range of sedentary work unsupported. *Id*. at 20. As counsel for the commissioner pointed out at oral argument, the vocational expert's reference to the position of file clerk as one available job includes jobs at the sedentary level.

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seem to limit her, you know, on a sedentary or light capacity." Record at 321.

E.g., Dictionary of Occupational Titles (U.S. Dep't of Labor, 4th ed. Rev. 1991) §§ 206.387-010 (classification clerk), 206.387-014 (fingerprint clerk II). In any event, the applicable regulations make clear that one who is capable of light work can also do sedentary work. 20 C. F.R. § 404.1567(b) ("If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time."). Counsel for the plaintiff did not identify in the itemized statement of errors or at oral argument any limitations other than those already discussed and rejected that would allow the performance of the three jobs identified by the vocational expert at the light exertional level but prevent the performance of a full range of work at the sedentary exertional level. The plaintiff offers no other particular basis for her argument that the evidence is insufficient to support the administrative law judge's conclusions. Accordingly, she is not entitled to relief on this basis.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of March, 2002.

David M. Cohen
United States Magistrate Judge

LINDA LONSBERRY FRANCIS JACKSON, ESQ.

plaintiff

JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713
PORTLAND, ME 04112-8713
207-772-9000

DANIEL W. EMERY, ESQ.

36 YARMOUTH CROSSING DR
P.O. BOX 670
YARMOUTH, ME 04096
(207) 846-0989

v.

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.
COMMISSIONER

defendant U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344

MARIA MASHIN, ESQ.

JFK FEDERAL BUILDING
ROOM 625
BOSTON, MA 02203-0002
617/565-4277

PETER S. KRYNSKI, Esq.
SOCIAL SECURITY DISABILITY
LITIGATION - ANSWER SECTION
OFFICE OF THE GENERAL COUNSEL

5107 LEESBURG PIKE ROOM 1704
FALLS CHURCH, VA 22041-3255
(703) 305-0183